Filed 6/22/09 Miller v. AC Horticultural Management CA2/4

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

RACHELLE MILLER et al., Plaintiffs and Appellants, v. AC HORTICULTURAL MANAGEMENT, INC., Defendant and Respondent.	B209783 (Los Angeles County Super. Ct. No. LC072148)

APPEAL from a judgment of the Superior Court of Los Angeles County, Richard B. Wolfe, Judge. Affirmed.

Glickman & Glickman and Steven C. Glickman for Plaintiffs and Appellants.

No appearance for Defendant and Respondent.

In the underlying action, appellants asserted a claim for negligence against respondent AC Horticultural Management, Inc. (ACHM), which did not answer the complaint. Appellants challenge the entry of a default judgment in ACHM's favor. We affirm.

RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

Appellants Rachelle, Mark, Jeff, and Steve Miller are the surviving relatives of Sheldon Miller. On August 1, 2005, they initiated the underlying action, asserting claims arising out of Miller's death, who was killed when a falling tree crushed the car he was driving on a public street. Their complaint alleged a claim for negligence against Daniel and Patricia Pondella (the Pondellas), who owned the property on which the tree had stood, and Doe defendants Nos. 1 through 25. In addition, the complaint alleged a claim against the City of Los Angeles (City) for a dangerous condition on public property. On February 8, 2006, appellants amended their complaint to name ACHM as Doe defendant No. 1.

The clerk entered ACHM's default in May 2006. In April 2007, appellants dismissed their claims against the Pondellas pursuant to a settlement agreement. After the trial court granted the City's demurrer to the complaint without leave to amend, appellants noticed an appeal from the ruling. Appellants later dismissed the appeal after resolving their claim against the City.

On November 1, 2007, appellants requested that a default judgment be entered against ACHM, the sole named defendant remaining in the action. The request asserted that ACHM, a professional tree service company, was "primarily responsible" for the accident. Appellant sought $1,135,344 in economic damages and $10,000,000 in non-economic damages. On June 4, 2008, after receiving appellants' evidence at a default prove-up hearing, the trial court entered a

judgment in ACHM's favor that awarded appellants no damages. This appeal followed.

DISCUSSION

Appellants contend that the trial court erred in entering a default judgment in ACHM's favor. We disagree.[1]

A. *Governing Principles*

Upon the plaintiff's application, the trial court is authorized to enter a judgment in a tort action when the defendant has failed to answer the complaint and the clerk has entered the defendant's default. (Code Civ. Proc., § 585, subd. (b).) Generally, "the party who makes default thereby confesses the material allegations of the complaint. [Citation.] It is also true that where a cause of action is stated in the complaint and evidence is introduced to establish a prima facie case the trial court may not disregard the same, but must hear the evidence offered by the plaintiff and must render judgment in his favor for such sum, not exceeding the amount stated in the complaint, or for such relief, not exceeding that demanded in the complaint, as appears from the evidence to be just." (*Taliaferro v. Davis* (1963) 216 Cal.App.2d 398, 408-409 (*Davis*), italics deleted.) The plaintiff may show a prima facie case by demonstrating that "substantial evidence exists to

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[1] No respondent's brief was filed. The rule we follow in such circumstances "is to examine the record on the basis of appellant's brief and to reverse only if prejudicial error is found. [Citations.]" (*Votaw Precision Tool Co. v. Air Canada* (1976) 60 Cal.App.3d 52, 55; accord, *Lee v. Wells Fargo Bank* (2001) 88 Cal.App.4th 1187, 1192, fn. 7; *Carboni v. Arrospide* (1991) 2 Cal.App.4th 76, 80, fn. 2; see Cal. Rules of Court, rule 8.220(a)(2); *In re Bryce C.* (1995) 12 Cal.4th 226, 232-233.)

support the claim for damages." (*Johnson v. Stanhiser* (1999) 72 Cal.App.4th 357, 364-365.)

The trial court may also enter a judgment in the defaulting defendant's favor when the complaint does not state a cause of action. (*Davis*, *supra*, 216 Cal.App.2d at pp. 408- 414; *Taliaferro v. Taliaferro* (1959) 171 Cal.App.2d 1, 3-9 (*Taliaferro*).) No judgment against the defendant can rest on such a complaint, as "'[a] defendant who fails to answer admits only facts that are well pleaded.'" (*Falahati v. Kondo* (2005) 127 Cal.App.4th 823, 829, quoting 6 Witkin, Cal. Procedure (4th ed. 1997) Proceedings Without Trial, § 160, p. 574; *Buck v. Morrossis* (1952) 114 Cal.App.2d 461, 466.)

The trial court's inquiry into the complaint's adequacy is akin to that triggered by a general demurrer, namely, whether the complaint lacks factual allegations indispensable to the asserted claims. (*Zucco v. Farullo* (1918) 37 Cal.App. 562, 564; *Alexander v. McDow* (1895) 108 Cal. 25, 29.) The trial court must indulge reasonable inferences in support of the factual allegations in the complaint; mere uncertainties and other defects subject to a special demurrer do not bar a default judgment against the defendant. (*Buck v. Morrosis*, *supra*, 114 Cal.App.2d at p. 466; see *Price v. Hibbs* (1964) 225 Cal.App.2d 209, 218.) Nonetheless, the absence of essential factual allegations is fatal to a judgment against the defendant. (E.g., *Falahati v. Kondo*, *supra*, 127 Cal.App.4th at p. 830 [complaint contained no factual allegations regarding defaulting defendant, who was mentioned only in caption]; *Vasey v. California Dance Co.* (1977) 70 Cal.App.3d 742, 749 [complaint lacked adequate alter ego allegations regarding defaulting defendant]; *Davis*, *supra*, 216 Cal.App.2d at pp. 408-414 [complaint lacked factual allegations needed to assert claim for accounting]; *Rose v. Lawton* (1963) 215 Cal.App.2d 18, 19 [complaint lacked factual allegations needed to

assert claim for specific performance of contract; *Williams v. Foss.* (1924) 69 Cal.App. 705, 707 (*Williams*) [same].)

In examining the complaint, the trial court may disregard allegations in the complaint contradicted by the plaintiff's admissions in seeking a default judgment. (*Taliferro, supra*, 171 Cal.App.2d at pp. 3-6; see *Scafidi v. Western Loan & Bldg. Co.* (1946) 72 Cal.App.2d 550, 560-561.) In *Taliaferro*, a married couple undergoing a divorce executed a property settlement agreement. (*Taliferro, supra*, 171 Cal.App.2d at pp. 3-4.) The husband later sought to set aside the settlement agreement on the grounds of extrinsic fraud. (*Id*. at p. 4.) The husband's complaint alleged that his wife had concealed from him an interlocutory decree of divorce that she had obtained in a prior action. (*Ibid*.) When the wife defaulted, the husband requested that a judgment be entered against her. (*Id*. at pp. 3-4.) The trial court rejected the request, and instead entered a judgment in the wife's favor. (*Ibid*.)

Affirming the judgment, the appellate court concluded that the claim for extrinsic fraud failed, as the husband had admitted in his briefs that he had been served with process in the prior divorce action and knew about it. (*Taliferro, supra*, 171 Cal.App.2d at pp. 5-6.) The court remarked: "The court's function must be to protect the legitimate interests of all the parties even in the situation where one party does not appear. Thus the court below properly determined, upon application for default judgment, that the complaint did not support a judgment. The inadequate allegations could not compose causes of action merely because of the absence of the opposing party." (*Id*. at p. 8; see also *Davis*, *supra*, 216 Cal.App.2d at pp. 409-410 [in denying plaintiff's request for a default judgment

and entering judgment in favor of defaulting defendant, trial court properly took judicial notice of prior judgments against plaintiff admitted in plaintiff's pleadings and arguments in court].)

When the complaint lacks allegations essential to the relief sought in the complaint, the plaintiff may not supply the missing allegations in the request for the default judgment or the showing of a prima facie case. As the court explained in *Williams*: "The default admit[s] nothing more than was alleged in the complaint. Under such circumstances, the fact that before entering the judgment the court received some evidence does not put the case on the basis of an action tried upon complaint and answer, wherein, as sometimes happens, the court hears evidence relating to an essential fact which had been omitted from the complaint." (*Williams, supra*, 69 Cal.App. at pp. 707-708; accord, *Davis*, *supra*, 216 Cal.App.2d at p. 409.)

Thus, in *Jackson v. Bank of America* (1986) 188 Cal.App.3d 375, 378, the plaintiff's complaint for fraud against a bank asserted that he had suffered damages, but failed to allege any conduct by the bank that had caused his losses. When the bank did not answer the complaint, the plaintiff sought a default judgment against it. (*Id*. at p. 382.) At the prove-up hearing, the plaintiff alleged for the first time specific conduct by the bank (some of which had occurred after the filing of the complaint) that had caused his damages, and submitted evidence in support of these new allegations. (*Id*. at pp. 384-385.)

Reversing the default judgment against the bank, the appellate court held that the plaintiff's failure to amend the complaint to include the new allegations barred him from asserting them at the prove-up hearing. (*Jackson v. Bank of America*, *supra*, 188 Cal.App.3d at pp. 388-389.) The court stated: "A defendant in a default action '"ha[s] the right to assume that the judgment which would

follow a default on her part would embrace only the issues presented by the complaint and the relief therein prayed.'" (*Id*. at p. 389, italics deleted.)

B. *Underlying Proceedings*

Appellant's complaint contained the following allegations: The Pondellas were trustees of the DJ and PL Pondella Trust (the Trust); as Doe defendant No.1, ACHM was also alleged to be a trustee of the Trust. Each defendant was alleged to be the "duly authorized agent, servant and employee" of the other defendants. The Pondellas (individually and as trustees of the Trust), together with ACHM, were "the owners, operators, managers and in possession and control" of a tract of real property near Reseda Boulevard. A tree growing on the property leaned "at a substantial angle" over Reseda Boulevard. The Pondellas and ACHM "negligently and carelessly instructed, employed, supervised, maintained, managed, controlled, conducted, operated, cleaned and designed said property in that" they allowed the existence of "an accident waiting to happen," without taking preventative or protective action. In addition, as a Doe defendant, ACHM was alleged to have been "negligently responsible in some manner for the events and happenings" that occurred. On March 30, 2005, Miller was driving his car on Reseda Boulevard when the tree fell on his car, killing him.

In requesting that a default judgment be entered against ACHM, appellants alleged that the Pondellas owned the property on which the pertinent tree stood. They further alleged that on January 8, 2005, the City issued a notice entitled "Notice to Abate Nuisance or Correct Violation" to the Pondellas, requiring them to remove the leaning tree; that the Pondellas hired ACHM, a tree service company, to respond to the notice; and that on January 19, 2005, ACHM did some work on the trees on the property, but did not address the tree overhanging Reseda

Boulevard that killed Miller on March 30, 2005. In support of these allegations, appellants submitted copies of the City's notice to the Pondellas and a statement from ACHM stating that it had provided $525.00 in tree trimming services on January 19, 2005. In addition, appellants provided a declaration from their counsel, who stated that to "[his] personal knowledge" the allegations in the request for a default judgment were true.

The trial court requested and received additional briefing on whether the alleged contract between the Pondellas and ACHM imposed a duty of care on ACHM to Miller. In ruling, the trial court accepted appellants' admission that ACHM was a tree service company, rather than an owner of the property, and found that appellants' request for a default judgment failed to show that ACHM had a duty to Miller. The trial court determined that appellants alleged no contractual or other special relationship between ACHM and Miller. In addition, the trial court determined that under the allegations, ACHM had engaged in "nonfeasance," as it had not removed the tree, but had done nothing to enhance the pre-existing hazard that the tree presented. Absent allegations that ACHM had a contractual or special relationship with Miller, the trial court concluded that mere nonfeasance was insufficient to impose a duty on ACHM to Miller.

C. *Analysis*

Appellants contend that the allegations contained in their request for a default judgment establish that ACHM had a duty to Miller to remove the tree. The crux of their argument is that ACHM, in entering into the contract with the Pondellas to abate the nuisance posed by the tree, became subject to a duty to protect members of the public, including Miller, from the tree. As explained below, we do not address this argument, as the judgment is properly affirmed on

other grounds.[2] In requesting the default judgment, appellants admitted that the key allegations in the complaint regarding ACHM's alleged duty to Miller -- namely, that ACHM owned and controlled the property -- were *false.* Having thereby denied the principal duty-grounding allegations in the complaint, appellants could not properly obtain a default judgment on the basis of new allegations regarding ACHM's duty to Miller.

The existence of a duty of care is essential to a negligence claim (*Artigilio v. Corning Inc.* (1998) 18 Cal.4th 604, 614 (*Artiglio*)), and thus "[a] complaint which lacks allegations of fact to show that a legal duty of care was owed is fatally defective" (*Hegyes v. Unjian Enterprises, Inc.* (1991) 234 Cal.App.3d 1103, 1111, italics deleted). As Witkin explains, "[u]nder generally accepted principles, two distinct kinds of duties of care may be involved in negligence actions: (1) The general duty of a person to use ordinary care in activities from which harm might reasonably be anticipated, the breach of which consists of actively careless conduct; (2) the affirmative duty where the defendant occupies a particular relationship to others, the breach of which may consist merely of failure to act affirmatively to prevent harm. [Citation.] Either kind of duty may be based on the common law, statute, or contract. [Citation.] [¶] Although the legal conclusion that 'a duty' exists is neither necessary nor proper in a complaint, facts that cause

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[2] On appeal, "[w]e do not review the trial court's reasoning, but rather its ruling. A trial court's order is affirmed if correct on any theory, even if the trial court's reasoning was not correct. (*Davey v. Southern Pacific Co.* (1897) 116 Cal. 325 . . . .)" (*J.B. Aguerre, Inc. v. American Guarantee & Liability Ins. Co.* (1997) 59 Cal.App.4th 6, 15-16.) Thus, we may affirm the trial court's ruling "on any basis presented by the record whether or not relied upon by the trial court." (*Day v. Alta Bates Medical Center* (2002) 98 Cal.App.4th 243, 252, fn. 1.)

it to arise (or from which it is 'inferred') are essential to the cause of action. [Citations.]" (4 Witkin, Cal. Procedure (5th ed. 2008) Pleading, § 580, p. 708.)

Conclusory allegations of negligence ordinarily do not cure the omission of factual allegations establishing a duty. (4 Witkin, Cal. Procedure, *supra*, Pleading, § 598, at p. 723.) Thus, in *Royal Ins. Co. v. Mazzei* (1942) 50 Cal.App.2d 549, 551-554, disapproved on another ground in *Mosley v. Arden Farms Co.* (1945) 26 Cal.2d 213, 220, the plaintiff was injured when the truck he was driving touched electrical wires owned by the defendant. In asserting a claim for negligence, the plaintiff alleged that the defendant had "negligently maintain[ed] three electrical wires crossing said road at a height of approximately 12 feet." (*Royal Ins. Co. v. Mazzei, supra*, 50 Cal.App.2d at p. 551.) The appellate court concluded that these allegations failed to establish the defendant's duty "to maintain the wires at any particular height." (*Id*. at p. 556; see also *Hauser v. Pacific Gas & Elec. Co.* (1933) 133 Cal.App. 222, 224-226 [reaching a similar conclusion on similar facts].)

Here, the primary duty-grounding allegations in the original complaint were that the Pondellas and ACHM, as trustees of the Trust, were "owners, operators, managers and in possession and control" of the property in question, and as such, negligently permitted the tree to lean over Reseda Boulevard. Nonetheless, when appellants sought the default judgment, their counsel admitted that the property did not belong to ACHM, and argued instead that ACHM had a contract for tree trimming services with the Pondellas. In denying the default judgment, the trial court accepted these admissions, stating that ACHM "was not the possessor of land which was, in actuality, owned by the Pondellas," but was a "tree trimmer."

The duty that appellants attributed to ACHM as a property owner in the complaint is distinct from that alleged in their request for a default judgment.

Landowners such as the Pondellas have a statutory duty to abate nuisances posed by trees on their property that overhang public streets. (Civ. Code, § 3479; see *Mattos v. Mattos* (1958) 162 Cal.App.2d 41, 42-43.) In contrast, a tree trimmer's duty to protect third parties from hazards posed by trees ordinarily arises from the trimmer's contract with the pertinent owner. (*San Diego Gas & Electric Co. v. Davey Tree Surgery Co*. (1970) 11 Cal.App.3d 1096, 1098-1099 (*San Diego Gas*).)

As our Supreme Court has explained, although the existence of a duty of care is generally governed by the multi-factored test in *Rowland v. Christian* (1968) 69 Cal.2d 108, courts may look to section 324A of the Restatement Second of Torts (section 324A) for guidance concerning duties of care arising out of a contract.[3] (*Paz v. State of California* (2000) 22 Cal.4th 550, 557-558 (Paz); see also *Artiglio, supra*, 18 Cal.4th at pp. 612-614.) Generally, "a person who has not created a peril is not liable in tort for failing to take affirmative action to protect another unless [he has] some relationship that gives rise to a duty to act." (*Paz, supra*, 22 Cal.4th at p. 558.) A relationship of this sort may arise through a voluntary undertaking. (*Id*. at pp. 558-559.) Section 324A states: "One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things,

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3 Under the *Rowland* test, the existence of a duty of care is determined by reference to numerous policy factors, including "'the foreseeability of harm to the plaintiff, the degree of certainty that the plaintiff suffered injury, the closeness of the connection between the defendant's conduct and the injury suffered, the moral blame attached to the defendant's conduct, the policy of preventing future harm, the extent of the burden to the defendant and consequences to the community of imposing a duty to exercise care with resulting liability for breach, and the availability, cost, and prevalence of insurance for the risk involved. [Citations.]'" (*Parsons v. Crown Disposal Co.* (1997) 15 Cal.4th 456, 473, quoting *Rowland v. Christian*, *supra*, 69 Cal.2d at p. 113.)

is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to [perform] his undertaking, if [¶] (a) his failure to exercise reasonable care increases the risk of such harm, or [¶] (b) he has undertaken to perform a duty owed by the other to the third person, or [¶] (c) the harm is suffered because of reliance of the other or the third person upon the undertaking."

Under section 324A, the "'foundational requirement'" for a duty is that the actor "'must specifically have undertaken to perform the task that he is charged with having performed negligently.'" (*Artiglio, supra*, 18 Cal.4th at p. 614; accord, *Paz*, 22 Cal.4th at p. 559.) In the case of tree trimmers, this requirement mandates an inquiry into the underlying contract for services to the pertinent owner. Thus, in *San Diego Gas*, an avocado picker was injured when his pole touched an electrical wire near an avocado tree, and he prevailed on a claim for negligence against the wire's owner and a tree trimming service. (*San Diego Gas, supra*, 11 Cal.App.3d at pp. 1098-1099.) In examining the judgment, the appellate court explained that the trimmer's duty to the picker -- if any-- arose solely from the contract between the trimmer and the wire's owner, and that the scope of the trimmer's duties was a factual question determined by the terms of the contract. (*Id*. at pp. 1099-1100.)

The question before us is whether the complaint adequately alleges that ACHM had a contract-based duty to Miller, once the allegations that ACHM was a property owner are disregarded. No duty based on a voluntary undertaking is alleged when the facts fail to show that the promised performance encompassed the source of the pertinent injury. (See *Weissich v. County of Marin* (1990) 224 Cal.App.3d 1069, 1079-1081 [complaint inadequately alleged that public entities had a duty to warn victim about assailant in 1986 on the basis of a promise to warn

made in 1975].) Here, the allegations in the complaint do not establish that ACHM had a duty to Miller. Setting aside the allegations identifying ACHM as a property owner, the remaining allegations are that the ACHM was the Pondellas' employee or agent, and that ACHM "negligently and carelessly . . . cleaned" the property in that it took no action regarding the tree. Nothing in the complaint states that ACHM was, in fact, hired to abate the hazard posed by the tree, or that the Pondellas (or Miller) relied on ACHM to do so. Accordingly, the complaint does not allege the "'foundational requirement'" for a duty to Miller, namely, that ACHM "'specifically [] undert[ook] to perform the task that [it] is charged with having performed negligently.'" (*Artiglio*, *supra,* 18 Cal.4th at p. 614).

Because the complaint lacks the allegations indispensable to ACHM's purported duty to Miller, ACHM's failure to answer the complaint did not admit the facts required for a judgment against it. (*Taliferro*, *supra,* 171 Cal.App.2d at pp. 8-9.) The defect in the complaint could not be cured by the new allegations in appellants' request for a default judgment, as ACHM "admitted nothing more than was alleged in the complaint." (*Williams, supra,* 69 Cal.App. at p. 707.) In sum, the trial court properly entered a default judgment in ACHM's favor.

DISPOSITION

The judgment is affirmed. Appellants are to bear their own costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

MANELLA, J.

We concur:

WILLHITE, Acting P. J.

SUZUKAWA, J.